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No. 445

In the Supreme Court of the United States

OCTOBER TERM, 1959

WALDO FRANK, *Petitioner*

v.

CHRISTIAN A. HERTER, SECRETARY OF STATE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. App. B, pp. 30-36) is reported at 269 F. 2d 245.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1959 (Pet. App. C, p. 37). The petition for a writ of certiorari was filed on September 30, 1959.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Government, in the conduct of foreign policy, may restrict the travel of its citizens in the portion of China under Communist control by limiting passports to exclude that area.

2. Whether the petitioner was illegally discriminated against by reason of the refusal of the Government to lift the travel ban as to him when it permitted a limited number of correspondents designated by certain news-gathering organizations as their representatives to go to Communist China.

STATUTES AND REGULATIONS INVOLVED

1. 22 U.S.C. 211(a) provides:

Authority to grant, issue, and verify passports.

The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

2. 22 U.S.C. 1732 provides:

Release of citizens imprisoned by foreign governments.

Whenever it is made known to the President that any citizen of the United States has been un-

justly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress. (R.S. § 2001.) [Derived from the Act of July 27, 1868, c. 249, § 3, 15 Stat. 223, 224.]

3. 8 U.S.C. 1185 provides:

Travel control of citizens and aliens during war or national emergency.

(a) *Restrictions and prohibitions on aliens.*

When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

* * * * *

(b) *Citizens.*

After such proclamation as is provided for in subsection (a) of this section has been made and

published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

* * * * *

4. The pertinent portion of Executive Order No. 7856 (March 31, 1938), 3 F.R. 799, 805, as codified in Title reads as follows:

22 C.F.R.

PART 51—PASSPORTS

Subpart A—Regulations of the President

* * * * *

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

STATEMENT

The petitioner, a United States citizen, is currently in possession of a United States passport, No. 850376, due to expire on February 15, 1960. At all times relevant to this case, the passport contained the following restrictive endorsement (R. 3):

> This passport is not valid for travel to the following areas under control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria and those portions

of China, Korea and Viet-Nam under Communist Control.

This same limitation appeared in all other passports issued on or about the date of the petitioner's (R. 96).

The petitioner requested the Secretary of State to remove this restrictive endorsement from his passport and to permit him to travel to Communist China for the announced purpose of assisting in the furthering of cultural relations between the United States and the Chinese people (R. 20-22). The State Department refused his request (R. 22-24).

In August 1957, the Secretary of State decided to permit travel of a limited number of United States news representatives to Communist China on an experimental basis, to provide for direct reporting to the American people about internal conditions on the China mainland. To implement this experimental program, the Department of State requested each news-gathering organization (approximately 40) which had demonstrated sufficient interest in foreign news coverage to maintain at least one full-time American correspondent overseas, to designate one correspondent for the China mainland for a period of six months or longer. To this request by the Department, twenty-four news-gathering organizations[1] responded initially (R. 117), and each selected one correspondent to represent it in Communist China. The State Department thereupon validated the passports of these newsmen for travel to those portions of China under Communist control (R. 115-117). With one exception (*infra*, p. 12), the Communist Chinese regime has continu-

[1] At the present this number has been increased to thirty-one. Appendix, *infra*, p. 15.

ously refused to allow any of these news correspondents to enter the Chinese mainland.

After the above policy excepting certain international newsmen from the travel ban to Communist China had been in existence for a period of one year, the petitioner requested the Department of State to remove the limitation in his passport, on the basis that his "profession as journalist and scholar certainly qualifie[d] him for inclusion in the group of journalists whose travel was authorized by the Department" (R. 35-36). The Department replied that the petitioner—who had not been named to represent one of the 24 news-gathering organizations—"was not eligible for inclusion in the group of 'reporters—foreign correspondents' who have been issued passports valid for travel to and in Communist China" (R. 36-38).

The petitioner thereupon filed a complaint on November 12, 1958 (R. 3-6), in the United States District Court for the District of Columbia seeking a declaration that he had a constitutional right to travel to Communist China, that travel to Communist China would not constitute a violation of the passport laws of the United States and the terms and conditions of his passport, and that the refusal of passport facilities to the petitioner was arbitrary and discriminatory; and seeking an order directing the Secretary of State to refrain from continuing to deny the petitioner passport facilities necessary for his travel to Communist China (R. 6).

The District Court rendered a summary judgment against the petitioner on March 23, 1959, dismissing his suit (R. 133).

On July 6, 1959, the Court of Appeals affirmed the lower court's disposition of the case (Pet. App. B, pp.

30-36) on the authority of that court's earlier decision in *Worthy* v. *Herter*, No. 444 (Pet. App. A, pp. 15-29).

ARGUMENT

1. This case involves, not a mere question of the administration of the passport regulations, but an issue of foreign policy as it is implemented by the issuance of passports. It is obvious that the Secretary of State should not grant passports purporting to authorize travel in areas where United States citizens are, pursuant to validly adopted foreign policy, refused official permission to travel. If the foreign policy of the United States with respect to permitting intercourse with Communist countries were subject to review by the courts, the refusal to issue a passport or the imposition of limitations on one which is issued would provide an appropriate means of raising the issue. But if that foreign policy is not subject to judicial review, then it should not be indirectly reviewed under the guise of protecting a citizen's right to travel or his right to a passport. In this respect, this case differs basically from *Kent* v. *Dulles*, 357 U.S. 116, where the issue was whether the petitioner there, and others similarly situated, could be denied passports because of their particular "beliefs or associations" not on the ground of a foreign policy applicable to Americans generally. *Id.*, at 130.

2. If the Executive branch of the government has authority, as part of its duty to fix and implement foreign policy, to refuse official permission to United States citizens to travel in specific areas of foreign countries, the exercise of that authority is not subject to judicial review. This Court has repeatedly held

that such determinations of foreign policy are exclusively for the Executive and Legislative branches of the government and will not be reviewed by the courts. *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103; *United States* v. *Pink*, 315 U.S. 203; *Ex parte Peru*, 318 U.S. 578; *United States* v. *Belmont*, 301 U.S. 324; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304.

3. The court below was, we believe, entirely correct in its determination that it was well within the realm of the Executive's authority with respect to foreign relations to fix the limits where American citizens should travel in foreign countries. As we have pointed out, restriction on travel in Communist China was applied generally to all citizens and the limitation was included in all passports (*supra*, p. 5; R. 96). Moreover the measure was adopted—in part at least, and cumulative to other sanctions—in order to attempt to obtain the release of five United States citizens unjustly imprisoned in Communist China.[2] In *The Nereide*, 9 Cranch 388, Chief Justice Marshall stated at 422:

> * * * [T]he court is decidedly of opinion, that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political, not a legal measure. It is for the consideration of the government, not of its courts. The degree and the kind of retaliation depend entirely on considerations foreign to this tribunal. It may be the policy of the nation

[2] See the statement of Walter S. Robertson, United States delegate to United Nations anent the admission of Communist China to the United Nations. New York Times, September 22, 1959, p. 16, especially column 3.

> to avenge its wrongs, in a manner having no affinity to the injury sustained, or it may be its policy to recede from its full rights, and not to avenge them at all. It is not for its courts to interfere with the proceedings of the nation, and to thwart its views. It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics.

Moreover, Congress has by statute required the President to take appropriate action to protect Americans unjustly deprived of their liberty abroad. 22 U.S.C. 1732, *supra*, pp. 2-3. This has a double effect in respect to the passport limitations here involved: First, it provides general authority to the Executive to exercise that sanction, among others, as a step to free the citizens already imprisoned. And it would also support the executive action in excluding citizens from an area where they might in turn be imprisoned and thus require remedial action. International law publicists recognize that the suspension of travel in a foreign country is an instrument of foreign policy. Bishop, *International Law* (1953), p. 559; see also 2 Hyde, *International Law* (1922), pp. 169-172; Borchard, *Diplomatic Protection of Citizens Abroad* (1915), pp. 445-446, 453-455; 2 Lauterpacht-Oppenheim, *International Law* (7th ed. 1952), pp. 134-144.[3]

This argument disposes of the petitioner's point that under *Kent*, there must be "explicit action" by Congress authorizing the particular limitations imposed by the Secretary of State (Pet. 9-10). The authority here

[3] Pursuant to 8 U.S.C. 1185, the Secretary of State recently restricted the rights of aliens and citizens to leave the United States by private plane for Cuba. See New York Times, November 2, 1959, pp. 1, 17.

comes primarily not by action of Congress, but from the Constitution itself, which places the power over foreign relations in the Executive branch. As the cases cited, *supra*, p. 8, indicate, this grant has been given the broadest scope and there is no need for the type of specific delegation which may be required for an area within the legislative authority of Congress. As for the authorization from the President, in whom the Constitution vests the power, to the Secretary of State, it was specifically granted by Executive Order No. 7856, 3 F.R. 799, now appearing as 22 C.F.R. § 51.75, *supra*, p. 4.

There is also legislation in which Congress has recognized that the Executive must have power over foreign travel in order to perform its functions and has given its sanction to travel limitations. Section 215 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185, *supra*, pp. 3-4, grants to the President specific authority to impose certain travel restrictions on both citizens and non-citizens in time of war or national emergency. This power is exercised at present under Proc. No. 3004, 67 Stat. C31 (1953) and 22 C.F.R. §§ 53.1 to 53.7. And, as we have noted, the authority granted the President to "use such means, not amounting to acts of war" to secure the release of citizens unjustly imprisoned abroad, 22 U.S.C. 1732, *supra*, pp. 2-3, was intended to authorize a traditional international sanction, recognized as such by international law authorities—restricting intercourse with the foreign country involved.

4. The petitioner, finally, insists (Pet. 12-13) that the State Department's policy of validating the passports of a limited number of news representatives to

go to the Chinese mainland on an experimental and temporary basis, provided the Red Chinese regime receives them, is arbitrary. The identical argument was advanced below, and rejected. It is based on the assumption that the method of selection was not proper.

As is pointed out in the Statement (*supra*, pp. 5-6), the Department of State, in 1957, attempted to devise a formula to permit a *limited* number of American news-representatives to travel to the mainland of China in order to allow direct reporting by them for the American press about conditions in the area under Communist control. One of the main difficulties which at once arose was to strike a proper balance between the interest of the United States in keeping the number of newsmen within reasonable limits—so as not to create a false impression that the general prohibition against indiscriminate travel to the China mainland was being abrogated—and at the same time to afford to the news-gathering organizations as wide a latitude as possible. To foreclose possible future claims of "discrimination," "arbitrariness," or "favoritism," the Department, after consultation with representatives of the press, set forth the following as the basis for selection: each news-gathering organization which had demonstrated sufficient interest in foreign news coverage to maintain at least one full-time American correspondent overseas was asked to notify the Department whether it wished to send a full-time American correspondent to the China mainland, to be stationed there on a resident basis for six months or longer. The State Department agreed to validate, for a limited period, the passport of one news-correspondent associated with such an organization who was to be selected by the news organization itself. The newsmen who

qualify under this program are selected by the qualifying news-gathering agency, and not by the State Department, subject only to the limitation that the designation be made in good faith.

When the plan was first announced, twenty-four affirmative replies were at once received from such organizations as fell within the criteria set forth above; since August 1957, this number has increased to thirty-one (see the Appendix, *infra*, p. 15). The qualifying criteria were reasonable in terms of the objective sought—to permit direct reporting by American newsmen to the American people about conditions in the area under Chinese Communist control without substantially relaxing to the general ban on travel by Americans into Communist China. The plan, as devised, is experimental and limited. Only one of the correspondents thus selected and given a validated passport has been up to this time permitted by the Chinese Communists to enter the mainland.[4]

Turning to the petitioner, it is clear on the record in his case that he does not meet the criteria set forth by the State Department. No news-gathering organization, as outlined above, has ever submitted his name as its selected correspondent for purposes of gathering news in Communist China. Indeed, the petitioner does not, and cannot, make that claim. His grievance, as he puts it, is merely that other journalists have been given validated passports for travel to the China mainland, and he has not (Pet. 13).

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[4] John Strohm, a representative of Newspaper Enterprise Ass'n, Inc., of New York City, was granted entry by the Communist Chinese and visited the mainland from September 8 to September 30, 1958.

In his concurring opinion, Judge Burger examined the conflicting interests, the criteria selected by the Secretary of State, and the petitioner's claim, and said:

> * * * [The] threshhold decision [to permit a limited number of news correspondents to go to Communist China on an experimental basis] is political in the highest sense and is not reviewable on any basis in any circumstance by any court [Pet. App. B, p. 33].
>
> * * * * *
>
> Our duty is not to decide whether the Secretary of State has developed the best formula and criteria for this "experimental and temporary program" * * *, but simply whether he has exceeded his authority in acting as he has thus far, as shown by this record [Pet. App. B, p. 36].

On balance, Judge Burger concluded that the formula and criteria established for the selection of the reporters were not "discriminatory in the sense urged by appellant" (Pet. App. B, p. 36). That conclusion is correct and does not call for further review here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1959.

APPENDIX

According to information received from the Department of State, the following news-organizations have been accredited to send reporters to Communist China as of October 1959:

Organization	Designee
American Broadcasting Company	Falk, Raymond F.
Associated Press	Edwards, Forrest
Baltimore Sun	Potter, Philip
Chicago Daily News	Beech, William Keyes
Chicago Tribune	Manly, Chesly
Christian Science Monitor	No designee
Columbia Broadcasting System	Searles, Guy W.
Copley News Service	Brines, Russell
Cowles Magazines	No designee
Denver Post	Hosokawa, William K.
Encyclopedia Britannica	Benton, William
Fairchild Publications	Gilkerson, Yancey Sherard
McGraw Hill	Sanders, Sol W.
Minneapolis Star & Tribune	Grim, George Howard
Mutual Broadcasting System	Lewis, Fulton, Jr.
National Broadcasting Company	Robinson, James G.
National Geographic Magazine	No designee
Newspaper Enterprise Association	No designee
New York Herald Tribune	Steele, Archibald T.
New York Times	Durdin, Frank Tillman
Newsweek	Elegant, Robert S.
North American Newspaper Alliance	Forman, Harrison
Reader's Digest	Michener, James
St. Louis Post Dispatch	Childs, Marquis William
Saturday Evening Post	Bess, Demaree
Scripps Howard	Russell, Oland Dale
Time, Incorporated	Burke, James Cobb
United Press International	Shapiro, Henry
U. S. News and World Report	Martin, Robert W.
Wall Street Journal	Oganesoff, Igor
Westinghouse Broadcasting Company	Sheean, James Vincent

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